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(12)

No. 06-6330

IN THE

SUPREME COURT OF THE UNITED STATES

DERRICK KIMBROUGH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In its memorandum in opposition in this case, the government relies upon the brief in opposition it filed on September 19, 2006, in *Eura v. United States*, No. 05-11659 (hereafter "*Eura* Br. in Opp."). Memorandum for the United States in Opposition at 1-2. Petitioner accordingly replies to several points in the *Eura* opposition.[1]

[1] The government asserts that the *Eura* case is in an interlocutory posture because it has been remanded for resentencing, and that such posture alone justifies denial of the petition. *Eura* Br. in Opp. at 7 n.1. *Claiborne v. United States*, No. 06-5618, came to the Court in a similar posture, in that the district court had imposed a below-Guidelines sentence, the government appealed, and the court of appeals reversed and remanded for resentencing. This Court, however, deemed the issues raised by *Claiborne* to be of sufficient importance to warrant its review notwithstanding the case's procedural posture. The Court should do the same in the instant case.

1. The government proffers two merits-based arguments as to why the court of appeals' ruling in the *Eura* case (and therefore in Petitioner's case) was correct. Neither is persuasive.

a. The government first asserts that because Congress has decided as a policy matter that crack cocaine offenders should be sentenced more severely than powder cocaine offenders, the courts of appeals have correctly determined that district courts cannot consider the crack/powder ratio because doing so "would usurp Congress's proper role in setting sentencing policy for cocaine offenses." *Eura* Br. in Opp. at 11-12. This argument fails because the situation that the courts of appeals and the government decry already occurs, for example in the context of the so-called "career offender" guideline.

To explain, when enacting the Sentencing Reform Act, Congress directed the Sentencing Commission to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized" for defendants convicted of controlled substance offenses or crimes of violence who have two previous convictions for either crimes of violence or controlled substance offenses. 28 U.S.C. § 994(h). The Sentencing Commission fulfilled this directive by creating the career offender guideline. *See* U.S.S.G. § 4B1.1. (In notable contrast, as explained in the petition for certiorari, Congress has never explicitly directed the Sentencing Commission to incorporate the 100:1 crack/powder ratio into the Guidelines. *See* Petition for Writ of Certiorari at 13-14.) It is unquestioned in career offender cases, however, both before and after this Court made the Guidelines advisory in *United States v. Booker*, 543 U.S. 220 (2005), that sentencing judges may impose sentences lower than what the advisory guideline calculations call for. *See* U.S.S.G. § 4A1.3(b)(3)(A), p.s. (eff. Nov. 1, 2003) (in policy statement, acknowledging district court's authority to impose lower sentence in career offender cases by placing partial limitation on that authority).

b. The government further argues that "giving district courts the discretion to disregard the 100:1 ratio would run afoul of 18 U.S.C. § 3553(a)(6) by creating 'unwarranted sentencing disparity among defendants with similar records who have been found guilty of similar conduct'" in part because "courts inevitably would exercise their discretion in different ways . . . ." *Eura*. Br. in Opp. at 12. Like the preceding argument, this argument is a red herring because the situation the government describes also already occurs, again in the context of the "career offender" guideline.

As described above, defendants who commit controlled substance offenses or crimes of violence who also have two qualifying prior convictions for controlled substance offenses or crimes of violence are deemed to be career offenders. 28 U.S.C. § 994(h); U.S.S.G. § 4B1.1. To parallel the government's example, *see Eura* Br. in Opp. at 12, when asked to impose a lower sentence in a career offender case, one court might go lower on the basis of the instant offense; another court might go lower on the basis of the nature of the prior convictions; another court might go below the advisory guideline range based on a combination of the instant offense and prior convictions; and still another might decline to go below the guideline range at all. Yet no one would question those courts' authority to impose lower sentences on career offenders, notwithstanding Congress's express directive that such defendants be sentenced at or near the statutory maxima for their offenses of conviction, even though those courts might exercise their discretion in different ways. Sentencing in crack cocaine cases should be treated no differently, especially where – unlike career offender cases – there is no congressional directive to the Sentencing Commission to apply the 100:1 crack/powder ratio.

2. The government claims that, like the First Circuit's decision in *United States v. Pho*, 433 F.3d 53, 65 (1st Cir. 2006), the Fourth Circuit's *Eura* decision allows a district court to consider the nature of the drug and the severity of the advisory guideline range because the decision "expressly 'envision[ed] instances in which some of the § 3353(a) factors will warrant a variance in a crack cocaine case,'" when the sentencing court makes individualized findings that fit within the § 3553(a) factors. *Eura* Br. in Opp. at 16 n.2 (quoting *United States v. Eura*, 440 F.3d 625, 634 (4th Cir. 2006)). A fair reading of the *Eura* opinion, though, is that the majority is referring to facts other than the nature of the drug or the severity of the guideline range. *See Pho*, 433 F.3d at 65. If the majority intended to adopt the *Pho* court's view, then there would have been no need for Judge Michael to write separately to highlight the role that the Sentencing Commission's reports should play in crack cases. And if *Eura* held what the government claims it did, then the other circuits would have relied on its majority opinion, not Judge Michael's opinion

Further, in a critical distinction from the *Eura* case, the district court in Petitioner's case found specifically that the offense involved powder cocaine as well as crack cocaine. Pet. App. 25a. (In fact, Petitioner had considerably more powder than crack, yet it was the crack that drove the advisory guideline range calculations.) Notwithstanding the district court's application of the § 3553(a) factors to the particular facts of Petitioner's case, however, the court of appeals summarily vacated the sentence based on *Eura*. *See* Pet. App. 2a.

3. At the time that it filed its opposition in the *Eura* case in September of 2006, the government claimed that "[t]he court of appeals' decision does not conflict with any decision of any other court of appeals." *Eura* Br. in Opp. at 18. Since that time, the conflict has in fact deepened further.

On December 5, 2006, the U.S. Court of Appeals for the Eighth Circuit, sitting en banc, decided *United States v. Spears*, 469 F.3d 1166 (8th Cir. 2006) (en banc). In a 10-2 ruling, the majority held that "we now join our sister circuits in holding [that] neither *Booker* nor § 3353(a) authorizes district courts to reject the 100:1 quantity ratio and use a different ratio in sentencing defendants for crack cocaine offenses." 469 F.3d at 1176. In so holding, the *Spears* majority specifically rejected the position taken by the Third Circuit in its *Gunter* decision: "We do not adopt or endorse the Third Circuit's opinion that the crack/powder cocaine differential in the Guidelines may be a factor in the post-*Booker* sentencing process." *Id.* at 1175; *see United States v. Gunter*, 462 F.3d 237, 249 (3d Cir. 2006).[2]

Two judges in *Spears*, however, dissented from the decision. They disagreed with the majority because in their view, "if we start from the premise the guidelines' system is advisory, any advice given within such a system [such as the 100:1 ratio] cannot be binding by its very nature, no matter whether the advice is on matters of broad policy or otherwise." *Id.* at 1179 (Bye, J., dissenting, joined by Lay, J.). Accordingly, they concluded that "[i]t is therefore inconsistent with *Booker* to hold that district courts must follow congressional advice, or policy, when it is given within the context of an advisory system." *Id.* Similarly, in *United States v. Williams*, 472 F.3d 835 (11th Cir. 2006) (denying rehearing en banc of decision at 456 F.3d 1353 (11th Cir. 2006)), one judge argued that the majority's position requiring sentencing courts to apply the 100:1 ratio as

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[2] The government suggested in its *Eura* opposition that the import of *Gunter* is not clear. *See Eura* Br. in Opp. at 18 n.3. Petitioner respectfully counters that the Eighth Circuit's view in *Spears* makes clear what position the Third Circuit has taken: that after a district court has applied the 100:1 ratio in determining the advisory guideline range, the court has the discretion to consider the impact of the differential in determining whether to impose a sentence below the advisory range pursuant to § 3553(a). *See* 462 F.3d at 249. Accordingly, it is apparent that the Third Circuit's position conflicts with that adopted by the Eighth Circuit in *Spears* and by the Fourth Circuit in *Eura*.

incorporated in the Sentencing Guidelines violates *Booker* by making the drug guideline mandatory again. *Id.* at 843, 847-49 (Barkett, J., dissenting).

In short, the courts of appeals have adopted varying positions regarding whether a district court may take into account the impact of the 100:1 crack/powder ratio or consider the information provided in the several reports issued by the Sentencing Commission. On one end of the spectrum are the Fourth and Eighth Circuits, which have held that under no circumstances can a district court consider either the ratio or the reports. *United States v. Eura*, 440 F.3d 625 (4th Cir. 2006), *petition for cert. filed* June 20, 2006 (U.S. No. 05-11659); *United States v. Spears*, 469 F.3d 1166 (8th Cir. 2006) (en banc). In the middle is the dissenting judge in the Fourth Circuit, whose position has been adopted by the Seventh and Eleventh Circuits, and possibly by the Second Circuit, which would permit a district court to use the Sentencing Commission reports in evaluating the case before it. *Eura*, 440 F.3d at 635 (opinion of Michael, J.); *United States v. Jointer*, 457 F.3d 682, 687 (7th Cir. 2006), *petition for cert. filed* Oct. 27, 2006 (U.S. No. 06-7600); *United States v. Williams*, 456 F.3d 1353, 1369 (11th Cir. 2006), *petition for cert. filed* Oct. 19, 2006 (U.S. No. 06-7352); *see United States v. Castillo*, 460 F.3d 337, 361 (2d Cir. 2006); *see also United States v. Pho*, 433 F.3d 53, 65 (1st Cir. 2006) (clarifying that while district court may not disregard 100:1 ratio, "[b]y the same token, we do not intend . . . to suggest that, in a drug-trafficking case, the nature of the contraband and/or the severity of the projected guideline sentence may not be taken into account on a case-by-case basis"). Finally, on the other end of the spectrum is the Third Circuit, joined by the dissenting judges in the Eighth and Eleventh Circuits, which would allow a district court to consider the 100:1 ratio. *United States v. Gunter*, 462 F.3d 237, 249 (3d Cir. 2006); *Spears*, 469 F.3d at 1182 (Bye, J., dissenting, joined by Lay, J.); *Williams*, 472 F.3d at 843, 847-49 (Barkett, J., dissenting from denial of rehearing en banc).

Accordingly, this Court should step in now to resolve the issue presented in Question 1 of the petition for certiorari: Whether, in light of the two holdings in *Booker*, may a district court consider either the impact of the so-called "100:1 crack /powder ratio" implemented in the U.S. Sentencing Guidelines or the reports and recommendations of the U.S. Sentencing Commission in 1995, 1997, and 2002 regarding the ratio in carrying out the mandate of § 3553(a) to impose a sentence that is "sufficient but not greater than necessary" on a defendant?

CONCLUSION

For the reasons given above, Petitioner requests that this Court grant this petition for certiorari.

Respectfully submitted,

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